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ADMITTED TO PRACTICE: NY, MA

BY FIRST-CLASS MAIL

May 20, 2022

Honorable S. Bernard Goodwyn
Chief Justice of the Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219

Re: Virginia Jury Instructions

Dear Justice Goodwyn:

We write as counsel for Public.Resource.Org ("Public Resource"), a 501(c)(3) non-profit corporation based in California. The mission of Public Resource is to enhance public access to government information and public law. As you may be aware, Public Resource has made significant strides in pursuit of this mission, including a recent victory at the United States Supreme Court regarding public access to annotated state codes. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020). That case makes clear that edicts of government cannot be copyrighted by states and that there is a strong public interest in broad access to such edicts.

We write specifically to urge the Commonwealth of Virginia to remove barriers to access that the Commonwealth has impermissibly put in place with respect to the Virginia Jury Instructions - Civil and Virginia Jury Instructions - Criminal (together, the "VJI"), developed and promulgated by the Virginia Model Jury Instructions Committee (the "Committee"). We commend the Supreme Court of Virginia for making the unannotated VJI available online. At present, however, Virginia attorneys and the rest of the public must pay over $1,000 to a commercial publisher to gain access to the annotated VJI. Even for those that can afford the annotated VJI, these materials are not easily accessible to the visually impaired and are difficult to navigate.

Overview and Background

Our client has made the VJI, and model jury instructions from a number of other states, publicly available and digitally accessible on the non-profit Internet Archive (https://archive.org) at the following location:

https://archive.org/details/JuryInstructions

The collection offered by Public Resource has several features that make the edicts of government contained therein more useful. Books containing model jury instructions are scanned and then undergo several operations, such as Optical Character Recognition or "OCR," to convert typed text into machine-coded text. Public Resource uses custom open-source software code to create modern HTML files, making the materials more usable for the visually impaired. In the "subject and topics" pane accessible in the collection, a user may click on a particular state name to find materials for that jurisdiction. There is also the capability to search inside the texts across the entire collection, allowing a user to enter a search term such as "eviction":

https://archive.org/details/JuryInstructions?query=eviction&sin=TXT

The search identifies any volumes containing that search term. When the user clicks on a volume, it will open to the relevant page that contains the term; "pins" below the book identify other pages that have that word or phrase.

Public Resource is working with legal informatics clinics to make the collection even more usable, using big data and machine learning technologies to identify similar jury instructions in different states. By allowing such research efforts, our client expects to see even more improvements in accessibility and usability of the instructions. All of these materials are easily found on the world wide web using search engines such as Google or Bing.

The Virginia Model Jury Instructions

The VJI is an invaluable tool of democracy in the Commonwealth of Virginia. In making the VJI accessible to the broader public, Public Resource hopes to facilitate widespread participation in the Virginia legal system. The jury is a key component of a fair and accessible judicial system in the United States. The widescale availability of the VJI, therefore, contributes to fair and accessible justice in the Commonwealth of Virginia.

The VJI constitutes the best plain-language statement of the law as concerns charging of juries in civil and criminal cases in the Commonwealth. Although litigants are not required by law to use the VJI in Virginia, its use is common. This widespread use and encouragement is well-justified, given the quality of the VJI.

Edicts of Government Doctrine

As you are no doubt aware, because the VJI was issued in the name of the Supreme Court of Virginia Model Jury Instructions Committee and created by judges in the course of their judicial duties, it is not eligible for copyright. The American legal system operates on the assumption that every citizen knows the law. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1507 (2020). Thus, it follows that all citizens should have free access to the contents of

the law. *Id.* The U.S. Supreme Court has given effect to this principle through the articulation of the government edicts doctrine. *Id.*

The Copyright Act grants monopoly protection for "original works of authorship." 17 U.S.C. § 102(a). Effectively, this means that, to be copyrightable, a work must have a copyright-eligible author. Under the government edicts doctrine, officials empowered to speak with the force of law are not copyright-eligible authors of the works they create in the course of their official duties. *Georgia*, 140 S. Ct. at 1501. Thus, such government work product is excluded from copyright protection. *Id.* at 1504.

The government edicts doctrine, as it exists today, emerged from a trio of Supreme Court cases decided in the 19th century. *See Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888).

These three cases established a straightforward rule: because judges are empowered to speak with the force of law, they cannot be the authors of the works they create in the course of their official duties for the purposes of obtaining copyright. *Georgia*, 140 S. Ct. at 1507. In our client's recent case against the State of Georgia, the United States Supreme Court extended the application of the government edicts doctrine to include works created by legislators acting in their role as legislators. *Id.* at 1505.

In the 2020 *Georgia* decision, the Court clarified that the relevance of the government edicts doctrine to a particular work rests on the identity of the author rather than whether the work carries the force of law. *Id.* at 1506. Thus, it is not required to determine which materials constitute "the law," because the doctrine bars officials responsible for creating the law from being considered authors for copyright purposes of *any work* created in their lawmaking capacity. *Id.* In effect, this means that the doctrine applies not only to final legislation but also to explanatory and procedural materials that legislators create in their official duties (including but not limited to model jury instructions). *See id.* at 1508. Annotations prepared in the first instance by a third party at the behest of a government institution also fall within the government edicts doctrine. *See, e.g., id.* at 1505.

Under Supreme Court precedent, then, copyright protection cannot exist in works that, like the VJI, are (1) created by judges and legislators (2) in the course of their judicial and legislative duties. *Id.*

The Committee

The VJI is created by judges in the course of their judicial duties. More specifically, as described by the Supreme Court of Virginia, the VJI is created by the Virginia Model Jury Instructions Committee, to which the Chief Justice of the Supreme Court of Virginia appoints the members and tasks them with "developing and updating jury instructions for use in Virginia's courts." Press Release, Virginia Model Jury Instructions-Criminal Now Available in an Unannotated Format on Virginia's Judicial System Website (Jun. 26, 2019),

https://www.vacourts.gov/news/items/2019_0626_scv_press_release_model_jury_instructions.pdf.

The VJI itself lays out how integral the judicial branch's involvement has been to its creation and development. In 1975, Chief Justice Lawrence W. I'Anson appointed a committee to prepare model instructions that would eventually become the present-day VJI. *See* 1 VIRGINIA MODEL JURY INSTRUCTIONS — CRIMINAL iii (2020-2021 ed. 2020). The Committee has continued to produce model jury instructions over the last several decades, creating subsequent revised editions and annual supplements. *See id.* Members of the Committee meet annually to conduct a "comprehensive review of the publication contents" and approve or reject proposed changes to the VJI. *See id.* at 1-1.

The authors' dedication to the creation of model jury instructions is indistinct from their judicial duties. Additionally, the creators' experience as judges was a necessary part of their authorship. This experience gives the VJI the weight it holds today.

We commend the Commonwealth of Virginia for making the unannotated version of the VJI available online. However, Virginia attorneys and citizens still lack access to annotations and practice commentary that are crucial to understanding how to use the Commonwealth's model jury instructions. Even if Matthew Bender & Company performed considerable work in drafting annotations, the VJI is still considered a discharge of judiciary duties. *See Georgia*, 140 S. Ct. at 1509. The fact that the annotations summarize other materials like judicial decisions and law review "does not take them outside the exercise of" judicial duty. *Id.*

For these reasons, the Committee is a part of the judiciary, and the VJI was created as part of its authors' judicial duties. It is therefore ineligible for copyright protection.

Conclusion

The commitment shown by those involved in creating the VJI is a testament to their devotion to the law and public service. The intentions of those involved in the work would be best served through offering public access to these instructions, so that all may benefit from the knowledge that they have thoughtfully shared.

Particularly at a time when our nation's legal system has come under substantial scrutiny from all sides, a commitment to transparency and openness in the law is crucial to restoring public confidence. Those in the legal system should strive to eliminate barriers to information that should be widely available.

When announcing the release of the online version of the unannotated VJI, the Commonwealth recognized the act as a "service to the bench, bar, and public." Press Release, Virginia Model Jury Instructions-Criminal Now Available in an Unannotated Format on Virginia's Judicial System Website (Jun. 26, 2019). Removing all claims of copyright protection on the VJI would be an invaluable step towards further realizing this goal.

We hope you will agree that the entire public should be able to enjoy the benefits of the VJI. Currently, the VJI provides an inaccurate copyright notice that purports to vest ownership in Matthew Bender & Company, Inc. For the reasons explained, the VJI is not eligible for copyright protection. Therefore, we ask that you:

1. abandon and withdraw all copyright claims from both the annotated and unannotated VJI;

2. request that Matthew Bender & Company abandon and withdraw all copyright claims from the annotated and unannotated VJI; and

3. support efforts to provide public access to these important edicts of government.

Along with Public Resource, we would be more than happy to discuss this with you or your staff. Thank you for your time and attention.

Respectfully submitted,



Christopher T. Bavitz

cc: Carl Malamud
President, Public Resource (By Email)

David Halperin
Of Counsel, Public Resource (By Email)